



February 13, 2003

Ms. Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W., Room 1-A836
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation in CC Docket No. 01-338

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, this letter is to provide notice in the above-captioned docketed proceeding of an ex parte meeting on February 12, 2003, by Jonathan Askin of the Association for Local Telecommunications Services (ALTS), Julia Strow of Cbeyond Communications, Pete Manias of El Paso Global Networks, John Heitmann of Kelley Drye (for NuVox), and Patrick Donovan of Swidler Berlin (for Cbeyond) with Commissioner Martin and Dan Gonzalez. In a separate meeting on February 13, John Windhausen of ALTS, Julia Strow of Cbeyond Communications, Pete Manias of El Paso Global Networks, Jason Oxman and Praveen Goyal of Covad, Jake Jennings of NewSouth, Ed Cadieux of NuVox, and John Heitmann and Steve Augustino of Kelley, Drye met with Commissioner Martin and Dan Gonzalez. In another meeting on February 13, Jonathan Askin, Jason Oxman, and Praveen Goyal of Covad, along with Tom Koutsky and Chris Wright on behalf of Z-Tel, met with Jordan Goldstein. Jonathan Askin also had brief discussions with Christopher Libertelli, Matthew Brill, Lisa Zaina, and Jordan Goldstein. While the parties primarily discussed CLEC access to transmission facilities particularly loops, transport and enhanced extended links ("EELs"), this letter is an effort to sum up the lingering concerns of the ALTS membership as the FCC enters its Sunshine period and deliberates on the issues considered in this proceeding.

ALTS' mission is to promote facilities-based competition. We firmly believe that facilities-based CLECs provide innovative services, advanced technology, more efficient solutions to customers' needs, and a number of other consumer benefits. Facilities-based competition also stimulates economic growth and the purchase and manufacturing of telecom equipment.

Perhaps most important, facilities-based competition will help lead to a more deregulated telecommunications environment. We believe that some unbundling requirements on ILECs should be reduced over time as alternative facilities to the ILEC networks are deployed and available. We also believe that the state regulatory agencies play an important role in gathering and analyzing the factual information to determine the level of competitive deployment in each market. This is the most rational way to promote competition and deregulation.

For these reasons, ALTS has focused its advocacy in this proceeding on those network elements that are most fundamental to the growth of facilities-based competition – loops, transport, and loop-transport combinations. CLECs will have no incentive to purchase and install their own switches unless they can lease these transmission facilities to connect their switches and other equipment to the customer.

This document summarizes ALTS' previously filed statements on the variety of issues concerning transmission facilities that are most important to facilities-based competition.

In adopting a revised list of unbundled network elements, ALTS urges the FCC to simplify the provisioning process as much as possible. Since passage of the Telecom Act and the FCC's implementing rules, the ILECs have often precluded CLEC access to these facilities needed to bring CLEC technologies and services to potential customers. The FCC now has the opportunity to fix the remaining loopholes that have allowed ILECs to deny CLECs fair access to consumers and potential consumers. Whatever new rules or rule modifications the FCC adopts, the FCC must not allow the ILECs to latch onto any new loopholes to effectively preclude CLEC access to UNEs and UNE combinations. The FCC should adopt clear presumptions favoring UNE provisioning and procedures to ensure swift enforcement of the FCC UNE provisioning rules.

In our meetings and presentations, ALTS emphasized that the purpose of the UNE Review proceeding must be to promote local competition by ensuring that CLECs have the same ability to reach potential customers over ILEC-controlled local transport and local loop facilities so that facilities-based CLECs can compete on a level playing field against the ILECs and give consumers a choice of competitive services and technologies. The ALTS members have already invested tens of billions of dollars to deploy much of their own equipment (including state-of-the-art switches and advanced services equipment that offer the promise of unimagined services to American consumers) and are committed to using as few ILEC facilities as possible. But given the history and nature of the local telecommunications network and market, CLECs, even facilities-based CLECs, are still reliant in large part on ILEC local transmission facilities. The true danger is that consumers may not be able to take advantage of CLEC equipment and technology if CLECs cannot connect their equipment to potential customers via the local transport and local loop network. As such, the focus of this UNE Review proceeding must be to ensure CLEC access to potential customers over existing transmission facilities, without requiring CLECs to overbuild an entire local network or simply resell tired ILEC services. To this end, ALTS believes the FCC must ensure nondiscriminatory access to all local transmission facilities must afford CLECs the ability to use such facilities to provision a broad array of telecommunications offerings.

EELs:

Serious problems have arisen from the ILECs' imposition of use restrictions on CLEC access to EELs. ALTS has repeatedly noted the ILECs' refusal to provision EELs to CLECs and to preclude the commingling of EEL-eligible circuits with special access circuits. ALTS has also noted the logistical nightmare of having to police, monitor, measure and audit end user traffic. Most CLECs do not and, due to their technology, often cannot separate out LEC services from interexchange services. Thus, monitoring and policing is impractical, if not impossible. Furthermore, such an approach allows too much room for ILEC gaming and prejudging of circuit eligibility and would add such a layer of uncertainty that it effectively precludes many CLECs from even attempting to order EELs. Such action would put such a cloud of uncertainty over the whole CLEC business that this action alone would, at a minimum drive CLECs up market and small business customers would be left with whatever monopoly priced services the ILEC decides to offer and no affordable competitive service offerings. ALTS has argued that, if the policy objective is to protect the ILEC imbedded base of special access revenue (as expressed in the *EEL Clarification Orders*), that alleged problem is resolved by tying use restrictions only to special access to EEL conversions by the largest users of ILEC special access – the large long distance carriers – not by going down the slippery slope of compelling the smaller CLECs to satisfy onerous restrictions for special access conversions let alone having to satisfy such restrictions for new combinations. The additional administrative layer would harm only the transmission UNE-reliant CLECs and their customers and would-be customers desiring affordable, innovative alternatives to ILEC offerings. Additionally, ALTS has repeatedly stressed that EELs must be made available for the delivery of pure data services. The problem that the FCC had intended to fix was a massive conversion of IXC special access to EELs, thereby causing an immediate dramatic revenue reduction for the ILECs. The better solution to deal with the FCC-perceived problem is to impose special access-to-EEL use restrictions only on the largest carriers that purchase the lion's share of ILEC special access. To the extent that the FCC feels compelled to apply eligibility

criteria, use or service restrictions to EEL availability, the FCC must ensure that such gating mechanisms do not preclude CLECs, who do not have a high reliance on special access and thus do not pose a significant threat to ILEC special access revenues, from ready access to EELs. CLECs must be relieved of measurement and audit in order to demonstrate their right to EEL access.

What is perhaps most disturbing to facilities-based CLECs is that, while the FCC has taken significant action in recent years to ensure timely and cost-effective access to collocation space, the ILECs have simultaneously taken countermeasures to make collocation exceedingly more expensive thereby making UNE loop access unnecessarily expensive (e.g., increasing cross-connect fees or collocation power charges where arguably not subject to FCC oversight). Without ready access to EELs, and without the viable alternative of cost-effective collocation for UNE loop access, the ILECs might effectively preclude facilities-based CLECs from accessing customers unless the CLEC either resells ILEC services or entirely overbuilds the ILEC network.

Commingling Restrictions:

The FCC must put an end to ILEC use of commingling restrictions, which have made the EEL rules virtually meaningless for many CLECs who have been compelled either: (1) to purchase only special access even where circuits were EEL-eligible; (2) to purchase unnecessary, multiple DS-3 transport links to segregate EEL-eligible circuits from special access circuits; or (3) to purchase uneconomic multiple DS-1 EELs when a single DS-3 transport link combining both special access and EEL circuits would have sufficed. The only reason for this ILEC-imposed commingling restriction is to make the economics of local competition unworkable for the facilities-based CLEC. Additionally, the FCC must ensure that CLECs will be allowed to connect UNEs to services. Particularly in light of the fact that CLECs may lose access to some unbundled transport, it becomes increasingly important for CLECs to be allowed to connect and commingle their UNE loops to special access transport. Furthermore, as transport is removed on a particular route and the CLEC is arguably not entitled to UNE-priced transmission from the customers premises to the CLEC point of interconnection, it must be made clear that the CLEC is not all of a sudden obligated to collocate in order to connect its UNE loop to special access transport.

Transport:

Need for Route-by-Route Impairment Analysis:

With regard to unbundled transport, ALTS has contended that the impairment analysis must be applied on a route-by-route basis. Proxy tests that consider broadly how much alternative transport is available over a broader geographic area or how many carriers are collocated in ILEC end offices cannot demonstrate whether the requesting carrier is impaired without unbundled access to ILEC transport on a particular route. ALTS has expressed concerns over the possibility of the FCC adopting a transport impairment analysis that relies on a “contestable market” or “inference” test for the availability of true route-specific competitive alternatives to ILEC transport facilities. Such inferences or proxies demonstrate nothing about the ability of the CLEC to either obtain alternative transport or even build its own transmission facility to connect the implicated offices. Mere satisfaction of such tests would ignore consideration of the CLEC needs on the particular route and would leave the ILEC with absolute monopoly control on the route and the ability to deny access or charge monopoly rents on every route where insufficient alternatives exist.

ALTS has also noted extensively, that any transport impairment test must ensure that there is reasonable access to alternative transport providers offering the requested capacity. For instance, the ILEC must not be allowed to impose or perpetuate unreasonable terms and conditions for access to alternative transport providers (e.g., excessive rates for CLEC-to-competitive transport provider cross-connects, or obligations to connect

outside the ILEC CO). The ILEC cannot thwart the CLEC and alternative transport providers' ability to do through testing to ensure that a cobbled together alternative transport network is not inferior to ILEC-provided transport. Certainly, to the extent that the ILEC thwarts CLEC access to alternative transport providers, the ILEC must not be rewarded by being relieved of its unbundling obligations. ALTS has also noted the obvious danger of extending such a test to loop facilities, where the ILEC will undoubtedly provide the only viable access to CLECs hoping to connect their services and technologies to potential customers.

Capacity Limitations:

ALTS has also urged that the FCC decline to adopt a capacity-based cap on the availability of UNE transport facilities. Determining the capacity level at which competitors can economically self-deploy transport is an intensely fact-specific and situation-specific inquiry, that can vary dramatically based on changing market-conditions, such as vacillating capital and equipment markets, geographic conditions, service mix, and customer base. Any fixed threshold adopted by the FCC would be arbitrary and could not be sufficiently narrow and responsive to these situation-specific and dynamic factors. Precluding more than "x" number of DS-3 on a route to be purchased as UNEs is, without doubt, an arbitrary proxy to demonstrate when a CLEC has a sufficient customer or revenue base such that it would not be impaired without access to ILEC unbundled transport. The record cannot justify why "x" (not "y") is the correct number in every market and over time when technology and Moore's law will dramatically alter the revenue obtainable over the same capacity. Capacity and revenue obtained from a given capacity is dramatically changing over time -- the same DS-3 will deliver much more capacity over time, while the potential revenue obtained from that capacity will undoubtedly decline precipitously. Certainly, if the FCC were to impose a capacity limitation on the number of DS-3 transport links that the CLEC could obtain at UNE rates, that number must more closely approximate the level of capacity at which the deployment of optronics makes economic sense.

We had been led to believe that the draft Order contemplated a capacity limit of 3 UNE DS-3 transport links, above which the CLEC could choose between obtaining special access or dark fiber upon which the CLEC could attach its own optronics. The logic seemed to be at 3 DS-3, a CLEC might as well deploy its own OC equipment to provide OC-3 level transmission. As indicated on the record in this proceeding, a competitive carrier could not justify deployment of OC technology to serve demand at less than an OC-12, and even that level would pose serious economic challenges. Thus, a more acceptable trade-off would logically occur at 12 DS-3s, at which point the CLEC would arguably be less impaired by an obligation to attach its own optronics to dark fiber.

In any case, the transport rule must make clear that where the ILEC is not obligated to provide UNE transport above a certain capacity, the ILEC must be obligated to provide dark fiber so that the CLEC may readily attach its own optronics. Furthermore, any such capacity limitations must not apply to DS-1 level transport, where there is no reasonable trade-off between the number of DS-1 links and the point at which deployment of OC technology on dark fiber could make logical or economic sense.

Eligibility Criteria for UNE and UNE Combination Access:

ALTS has also discussed inevitable problems caused by imposition of use restrictions or eligibility criteria on new UNE combinations and stand-alone UNE loops. Every problem CLECs have experienced with special access to EEL provisioning would be realized with UNE loops, an area of provisioning that the CLECs had thought was almost resolved after six years of ILEC gamesmanship and periodic regulatory fixes to fill the loopholes that had allowed such gamesmanship.

High Capacity Loops:

The FCC must affirm that CLECs are impaired without nondiscriminatory access to loops, including DSL-capable loops and high capacity loops. CLEC access to unbundled stand-alone high capacity loops must not be subject to eligibility requirements or use restrictions. In six years since passage of the Telecom Act, there has been no evidence of misuse or erosion of special access revenues due to CLEC access to high capacity loops on an unrestricted basis. The FCC must at last put to rest the ILEC “no facilities” claims which the ILECs have used to deny UNE loops where provisioning would require the attachment of loop electronics. Furthermore, access to higher level capacity should not be capped at current capability or some distorted notion of what consumers may demand in the future. To cap the bandwidth or limit the offerings that a CLEC may provide to a customer over unbundled loops would essentially squeeze CLECs out of the market the moment the loop plant was capable of delivering a minimally more robust offering, and the ILECs would become unregulated monopolies with no incentive to invest or innovate.

Fiber-fed Loops

ALTS has also expressed deep concern over the prospect that the FCC may limit CLEC capacity to fiber-fed loop plant. If consumers are to obtain the benefits of competition, CLECs must be assured nondiscriminatory access to the full features, functionalities and capabilities of loop facilities. As we have said many times before, TELRIC pricing principles can adequately account for any demonstrated increase in costs or faster depreciation associated with arguably risky fiber deployment. CLECs have demonstrated their willingness to help defray the costs of such buildouts and, if CLECs were ensured nondiscriminatory access to fiber-fed loops, then ILECs would recover costs much more quickly by allowing CLECs to market services rapidly and reach a broader potential market than the ILEC could reach as a monopoly provider. The FCC must also consider the serious advantages the ILECs maintain, not just through access to their captive consumer base, but also because of superior access to conduits and other rights of way. ALTS has noted that, if CLECs are somehow relegated to old technology and capacity limitations, it would effectively preclude them from competing against an ILEC, which could always provide a minimally more robust offering or bundle of offerings at a fraction the price of the CLECs’ legacy offerings.

Nonetheless, the Commission appears to be considering a plan to exempt some fiber-fed facilities from the unbundling rules. ALTS adamantly objects to any such exemption for fiber-fed facilities used to serve business customers. Competition would effectively be killed in business markets if CLECs were relegated to static technologies and capacity limitations that would effectively preclude customers from obtaining state-of-the-art robust service offerings from the competitive carriers.

While ALTS does not believe it is good public policy to exclude residential fiber from the unbundling requirements, ALTS acknowledges that its companies can provide service to most of its residential customers today at speeds below 1.5 MPbs. Of course, to impose a “cap” on CLECs access to residential fiber poses implementational difficulties. In truth, any cap devised by the Commission would necessarily be based on the static technologies of today. Indeed, even today’s network facilities readily allow for alternative equipment enhancing their capabilities – for example, the most common digital loop carrier systems being deployed today allow for the installation of a variety of line cards, all capable of different speeds and features.

Accordingly, ALTS urges the Commission to proceed with the utmost of caution, should the Commission feel compelled to respond to incumbent LEC requests to develop a bandwidth cap for residential services. Specifically, ALTS urges the Commission to make clear that the incumbents must comply with the provisions of section 252(a), and negotiate in good faith over competitor access to loops including newer transmission technologies. The Commission should also make clear that, notwithstanding any bandwidth cap for residential services, incumbents remain under a statutory duty to provide competitors with non-discriminatory access to unbundled loops. As the marketplace for loop

transmission technologies develops and enhanced transmission technologies become most efficient and widely available, this duty would include the provision of loop transmission beyond the bandwidth cap specified by the Commission. To this end, ALTS strongly urges that the Commission make clear that, notwithstanding any finding in the *Triennial Review Order* that competitors are impaired without access to loop transmission technologies for residential end users up to a specified level of bandwidth, as the efficiency and cost of widely available loop transmission technologies evolve, the level and type of bandwidth without access to which competitors are impaired over such facilities may correspondingly change. ALTS also urges the Commission to make clear that, upon a particular showing of evidence that the marketplace for loop transmission technologies has evolved in such a manner, state commissions may find that competitors are impaired without access to the evolving capabilities of loops incorporating such transmission technologies.

Unfettered Use of Transmission Facilities

Finally, it must be reemphasized that CLECs should be allowed access to the full features, functionalities and capabilities of unbundled transmission facilities. For example, the CLEC should be allowed UNE access to the high frequency portion of a loop to deliver an ADSL-based service. Similarly, the CLEC must be allowed UNE access to dark fiber in both the transport and loop plant so that the CLEC may attach its own equipment to deploy innovative technologies. With these access assurances, carriers will be able to maximize the untapped capabilities of the embedded local transport network and consumers will be able to experience the promise of facilities-based competition.

If you have any questions about this matter, please contact me at 202-969-2587.

Respectfully submitted,

/s/

Jonathan Askin

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